

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 13TH APRIL 2007 / 23RD CHAITHRA 1929

Crl.Rev.Pet.No. 241 of 1999(K)

CC.847/1996 of JUDL.MAGISTRATE OF FIRST CLASS, KOLENCHERRY

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REVN. PETITIONER/PW1 IN CC 847/96:

KUNJAPPAN, S/O. PALLIPADAN,
MOOLATHUKUDY, VILANGU KARA,
KIZHAKKAMBALAM VILLAGE,
ERNAKULAM DISTRICT.

BY ADV. SRI.K.P.DANDAPANI, SENIOR ADVOCATE

RESPONDENTS/COMPLAINANT AND ACCUSED 1 TO 7:

1. KERALA STATE, REP. BY ASST. SUB INSPECTOR OF POLICE,
KUNNATHUNAD, REP. BY PUBLIC PROSECUTOR, HIGH
COURT OF KERALA, ERNAKULAM.
2. SEBASTIAN, S/O. CHERIAN, OOROTHU VEEDU,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.
3. RAJAN, S/O. PAULOSE, MEKKAMKUNNEL VEEDU,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.
4. THANKAPPAN, S/O.AISSAC, NARAKATTUKUDI VEEDU,
VILANGUKARA, KIZHAKKAMBALAM VILLAGE.
5. KUNJUMON, S/O. PAULOSE, KOCHOKKAL VEEDU,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.
6. AISSAC, S/O. MATHAI, NARAKATHUKUDI HOUSE,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.
7. ANTO, S/O.MATHAI, VAZHUTHANKATTUMALIL VEEDU,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.

8. VARGHESE, S/O. CHACKO, ARAKKAL VEEDU,
VILANGU KARA, KIZHAKKAMBALAM VILLAGE.

BY ADV. SRI.K.RAMAKUMAR FOR R2 TO R8
PUBLIC PROSECUTOR SRI. C.K. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13/04/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

K. HEMA, J.

CRL. R.P. No.241 OF 1999

Dated this the 13th day of April, 2007.

O R D E R

This revision petition is filed by de facto complainant challenging an order of acquittal.

2. A charge-sheet was submitted against accused-respondents alleging offences under Sections 143, 147, 448, 506(i) and 149 of Indian Penal Code. According to prosecution, PW1 was a witness in a Sessions Case and hence, accused on the date of occurrence, formed an unlawful assembly with the common object to trespass into the house of PW1, few of them committed house trespass and they also criminally intimidated him stating that he shall not give evidence on the next day before the court in the "bomb case" against Rajan and his friends, and that if such evidence was given PW1 and his boss would be killed etc.

3. To prove the prosecution case, prosecution examined PWs 1 to 5 and marked Exhibits P1 to P4 . The trial court analysed the evidence and found that evidence of PWs 1 to 3 is almost in conformity with prosecution case. But, trial court entered a finding against prosecution mainly based on the evidence of PW4 from whose

evidence it has come out that PWs 1 and 3 are working in the Kitex Company whereas PWs 1 and 3 stated that they have no connection with Kitex Company and hence evidence of PWs 1 and 3 regarding their connection with Kitex Company is unacceptable. The court was also noted the fact that PW4 was not declared as hostile at the instance of the prosecution.

4. Learned counsel appearing for revision petitioner submitted that PW4 was not declared as hostile only because Assistant Public Prosecutor was not present in the court. He was on leave and hence prosecution is seriously prejudiced. An affidavit was also filed by revision petitioner stating that Assistant Public Prosecutor was on leave on the crucial day on which PWs 4 and 5 were examined.

5. On going through the evidence of PW4, it can be seen that he had stated that PWs 1 and 3 are working in Kitex Company, whereas as per the evidence of PWs 1 and 3 they denied their connection with the Company. The question is whether the evidence of PWs 1 and 3 can be discarded or disbelieved, based on the sole evidence of PW4. If implicit reliance is placed on the evidence of PW4, of course, evidence of PWs 1 and 3 can be disbelieved. But, there is no reason why the evidence of PW4 has to be accepted and the evidence of other witnesses have to be disbelieved, only on account of the fact that PW4

stated a fact which is contrary to what is stated by PWs 1 and 3.

6. It is relevant to note that PW4 deposed contrary to a statement given by him to police under Section 161 of the Code of Criminal Procedure regarding a material fact with respect to accused. Though it appears that he made certain allegations to the police regarding involvement of accused and some aspects incriminating the accused to the police, he denied such statement given to police. But, he was not declared as hostile. When a material witness speaks against prosecution case on a material aspect by deviating from his earlier statement given to police, normally he will be declared as hostile by prosecution. This is not done in this case.

7. I am satisfied from the affidavit filed by revision petitioner and the failure on the part of prosecution to declare PW4 as hostile, the Assistant Public Prosecutor would not have been present on that day. Had Assistant Public Prosecutor been present and PW4 had been contradicted with reference to the case diary statement, it is unlikely that his evidence could be accepted by the court to disbelieve two other witnesses. The evidence of a hostile witness cannot normally be taken, as a basis for disbelieving the version given by other witnesses unless there are strong reasons to take such a course. In the above circumstances, I find that the trial court went wrong in discarding the

evidence of PWs 1 and 3, based on the evidence of PW4. PW4 could not be declared as hostile, in the absence of Assistant Public Prosecutor.

8. It is also argued that the other reason referred to in the judgment of court below to discard and to reject the prosecution case is that there was no electric connection in the building, where the incident occurred. It is come out from the evidence of PW5 Investigating Officer that there was no electric connection to that house. Therefore, evidence given by PWs 1 and 3 was disbelieved when they stated that the house was electrified.

9. Learned counsel appearing for revision petitioner argued that the entry made in the scene mahazar is evidently a clerical mistake and this fact could have been clarified by Assistant Public Prosecutor but he was not present in the court on the date on which PW5 was examined. The revision petitioner produced certain documents before this Court to satisfy and convince the court that the building was electrified, as on the date of occurrence and that recital in the scene mahazar would only be a mistake. It is submitted that an opportunity was denied to prosecution to explain this mistake, since PW5 was examined on a day when Assistant Public Prosecutor was not present in court.

10. I am satisfied from the submissions made and affidavit filed by revision petitioner that PWs 4 and 5 were examined on the day on which Assistant Public Prosecutor was absent. Serious prejudice has been caused to prosecution in examining PWs 4 and 5 in his absence, especially since trial court placed much reliance upon the failure on the part of prosecution in not declaring PW4 as a circumstance to disbelieve PWs 1 and 3. I am satisfied that there is some impropriety which requires correction.

11. Learned counsel appearing for respondents also argued that based on the evidence of PW4, evidence of PWs 1 and 3 can only be treated as motivated and interested. I am not able to accept this argument because it may not be proper to prefer one witness and accept another witness without any particular reason. It is only if PW4's evidence is accepted, evidence of others can be disbelieved based on the evidence of PW4. But, PW4 deviated from the statement given by him to police under Section 161 of the Code. But, prosecution did not get an opportunity to declare this witness as hostile. In the absence of this, it may not be proper on the part of the court to rely upon the evidence of PW4 to hold that the evidence of PWs 1 and 3 which run contrary to the evidence given by PW4 is unacceptable.

12. Learned counsel appearing for respondents strongly contended that this case is a false case filed at the instance of management of Kitex Company and PWs 1 and 3 are closely associated with the Company etc. It was also argued that a re-appreciation of evidence is not permissible in a revisional jurisdiction. Decisions were also cited to argue that revisional powers can be used only sparingly to interfere in the findings in a case of acquittal.

13. On the facts of this case, I find that no re-appreciation of evidence is required by me to interfere with the findings of the trial court. I have not re-appreciated evidence. But the only question considered is whether Assistant Public Prosecutor was present on the date on which PWs 4 and 5 were examined and whether his absence caused serious prejudice to prosecution. To answer this point, I need not enter any finding into merits of the case. It appears from the arguments advanced and the affidavit filed that the learned Public Prosecutor was not present on the day on which PWs 4 and 5 were examined and evidence of PW4 could not be treated as hostile since Assistant Public Prosecutor was not present.

In the above circumstances, I find that the order under challenge warrants interference. Hence, the order under challenge is set aside and the case is remanded to trial court for fresh consideration and

disposal in accordance with law, after giving an opportunity to prosecution to examine PW4 and PW5, in the light of the observations made in this order. The case shall be disposed of as expeditiously as possible.

This revision petition is allowed.

K. HEMA, JUDGE

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